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DAVID A. SAXTON,
Petitioner-Appellant,
vs.
STATE OF IDAHO,
Respondent.

FILED - COPY

APR - 4 2012

Supreme Court Court of Appeals
FBI/DOJ

APPEAL FROM THE DISTRICT COURT OF THE SEVENTH JUDICIAL
DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF
JEFFERSON

LAWRENCE WASDEN
Attorney General
State of Idaho
Attorney for
Plaintiff-Respondent

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Idaho Falls, Idaho 83405
Attorney for
Defendant-Appellant

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STATEMENT OF THE CASE

Nature of the Case

This is an Appeal from the Court's Order dismissing Defendant's *Pro Se* application for Post Conviction Relief. (R. Pg.26) The Appellant on June 21, 2010 timely filed a *Pro Se* Petition and Affidavit for Post Conviction Relief. (R. Pg. 5). Following the filing of that *Pro Se* Petition, the Court issued its Notice of Intent to Dismiss pursuant to Idaho Code § 19-4906(b). The Court indicated that Mr. Saxton had failed to "specifically set forth the grounds upon which the application is based, and clearly state the relief desired" as required by Idaho Code §19-4903. That Notice of Intent to Dismiss was issued on March 11, 2010. Subsequent thereto, on April 11, 2011 the Court entered its Order of Dismissal pursuant to Idaho Code § 19-4906(b). This Appeal follows.

It should be noted that there was some question whether or not the Appellant had been properly served with the Court's final Order of Dismissal of his Petition for Post Conviction Relief as evidenced by the inquiry made by the Appellant to the District Court entitled "Letter of Clarification request for the Court's Order Dismissing Petition." (R. Pg. 27) This Court did initially enter an Order of Conditional Dismissal of this Appeal on the basis that it may not have been timely filed, however after receiving Appellant's response to that Notice and explanation for the delay in the filing of the Appeal, the Appeal was reinstated.

Statement of Facts and Course of Proceedings

The Defendant initially entered a plea of Guilty to the Charge of Battery to Commit a Serious Felony in Criminal Case Number CR-2006-4260 in the District Court of Jefferson County, Idaho, Judge Joel Tingey presiding. The Appellant was sentenced on January 4, 2008 to a fixed term of 2 years with a 10 year indeterminate period to follow. (Idaho Supreme Court

Records Repository)

The Court suspended the original sentence imposed and placed the Appellant on probation for a term of 15 years. The case history repository records from the State of Idaho reflect that there were various probation violations proceedings occurring thereafter ultimately resulting in the revocation of probation and imposition of the original penitentiary sentence on January 30, 2009. A subsequent Motion to Reduce Sentence pursuant to Rule 35 of the Idaho Criminal Rules was filed and heard by the Court which was denied on May 1, 2009. A copy of the Idaho Supreme Court Records Repository is attached hereto as Exhibit "A".

The Appellant alleges in his Petition for Post Conviction Relief filed January 15, 2010 that he was denied effective assistance of counsel based upon his trial counsel's failure to file an Appeal on his behalf following the revocation of his probation and imposition of his sentence.

ISSUES

- I. The District Court erred in Dismissing the Appellant's Application for Post Conviction Relief because he had sufficiently alleged a claim of ineffective assistance of counsel based upon counsel's failure to file a direct appeal.

ARGUMENT

The Appellant asserts that the District Court improperly dismissed his Application for Post Conviction Relief as he had an absolute right to a direct Appeal from the Order revoking his probation and imposing sentence in this case. His Petition and Affidavit for Post Conviction Relief states in vary concise terms the allegation of ineffective assistance of counsel. Paragraph 9 of the Petition states as follows:

(a) I had asked my attorney to file an Appeal in my case, and he failed to do so.

(b) Counsel denied my U.S.C. right to a direct appeal violation my 5, 6, and 14 Amendment, Due Process, Equal Protection, the right to counsel (R. Pg. 7)

In support of that Application, the Defendant's Affidavit which appears to be properly notarized stated as follows:

On the 4th day of January, 2008 I had informed my attorney that I wanted him to file an appeal, and he refused to file notice of appeal, which denied me my U.S.C. Art. 7, Amendments 5, 6, 14, Section 1....

I asked him specifically to file an appeal in my case, and he refused to do so, and that is ineffective assistance of counsel as outlined in Strickland v. Washington.
(R. Pg. 10)

There is some factual ambiguity in that statement as to why the appellant would have asked his attorney to file an appeal on January 4, 2008. The repository record in this case would reflect that he was still caught up in the midst of various probation violation proceedings and there had not yet been an order entered imposing his sentence. That did not occur until a little over a year later on January 30, 2009. There is however some evidence in the record of the proceedings in this case that Defendant suffers from some mental health issues as a competency evaluation was apparently ordered as part of the probation violation proceeding. (Ex. A)

The Idaho Court of Appeals in the case of Beasely v. State of Idaho, 126 Idaho 356, (Ct. App. 1994) held that the Defendant's right to representation by counsel extends to all critical stages of his case including appeal. The Court in that case specifically held that the Petitioner was entitled to Post Conviction Relief based upon trial counsel's failure to file a direct appeal. As in this case, the District Court had denied Beasely's application for post conviction relief on the basis that he had failed to specify the issues he would have raised on Appeal and the prejudice shown therefrom. The Court in Beasely specifically held that the District Court in that matter incorrectly required Beasely to establish prejudice in its denial of his Post Conviction Application. Likewise, the Court in this matter should reverse the District Court's Order dismissing the Appellant's Application for Post Conviction Relief as it would appear that Order is contrary to this Court's upholding in Beasely and Appellant should not have been required to show specific prejudice pursuant to the District Court's Notice of Intent to Dismiss.

It would further appear that it is not disputed in the record before this Court that Mr. Saxton had requested that trial counsel file an Appeal on his behalf. It at least raises a issue of fact that would prevent summary dismissal. Specifically, the question as to the time frame in which Mr. Saxton had requested an Appeal be filed as there is some ambiguity in his Affidavit as to time frame in which he asked counsel to file an Appeal.

Appellant respectfully requests that this Court reverse the District Court's Order of Dismissal and reinstates his Application for Post Conviction Relief or in the alternative grant the relief requested therein and reinstate Petitioners right for a direct appeal from the Court's Order imposing sentence.

DATED this 30th day of March, 2012


STEVAN H. THOMPSON, ESQ.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I am a licensed attorney in Idaho, with my office in Idaho Falls, and that on the 30th day of March, 2012, I served a true and correct copy of the following-described document on the parties listed below, by mailing or by facsimile, with the correct postage thereon, or by causing the same to be hand delivered.

DOCUMENT SERVED:

BRIEF OF APPELLANT

PARTIES SERVED:

LAWRENCE WASDEN, ESQ.
Deputy Attorney General
Criminal Law Division
P.O. Box 83720
Boise, ID 83720-0010

() Mailed
() Faxed


STEVAN H. THOMPSON, ESQ.

Case Number Result Page

Jefferson

1 Cases Found.

State of Idaho vs. David Saxton

No hearings scheduled

Case: CR-2006-0004260	District Judge: Joel E. Tingey	Amount due: \$0.00	Closed
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Charges:	Violation Date	Charge	Citation	Degree	Disposition
	12/03/2006	I18-6101 Rape Officer: Other Officer,, OA		Felony	Finding: Guilty Disposition date: 06/18/2007 Fines/fees: \$0.00 Discretionary: 90 days Det Penitentiary: 2 years Indet Penitentiary: 10 years
	12/01/2007	IPV Probation Violation-misdemeanor Officer: Other Officer,, OA		Misdemeanor	Finding: Guilty Disposition date: 01/29/2009 Fines/fees: \$0.00 Det Penitentiary: 2 years Indet Penitentiary: 10 years

Register
of
actions:

Date

- 12/07/2006 New Case Filed
- 12/07/2006 Prosecutor Assigned Penny North Shaul
- 12/07/2006 Hearing Scheduled (Arraignment 12/07/2006 02:00 PM)
- 12/07/2006 Felony Minute Entry
- 12/07/2006 Criminal Complaint
- 12/07/2006 Warrant Issued - Arrest Bond amount: 200000.00 Defendant: Saxton, David
- 12/07/2006 Case Status changed: Inactive
- 12/07/2006 Hearing result for Arraignment held on 12/07/2006 02:00 PM: Arraignment / First Appearance
- 12/07/2006 Warrant Returned Defendant: Saxton, David
- 12/07/2006 Case Status changed: Activate (previously inactive)
- 12/07/2006 Hearing Scheduled (Preliminary 12/20/2006 09:00 AM)
- 12/07/2006 Defendant: Saxton, David Order Appointing Public Defender Court appointed Robert L. Crowley Jr.
- 12/07/2006 CR Order Appointing Attorney
- 12/07/2006 Hearing Scheduled (Bail Reduction 12/13/2006 09:00 AM)
- 12/07/2006 Hearing Scheduled (No Contact Order 12/20/2006 09:00 AM)
- 12/12/2006 Request for Discovery
- 12/12/2006 Response to Request for Discovery
- 12/12/2006 Hearing result for Bail Reduction held on 12/13/2006 09:00 AM: Hearing Vacated per Rob Crowley
- 12/13/2006 Motion and Order appointing Dr Kenneth Lindsey
- 12/15/2006 Hearing result for Preliminary held on 12/20/2006 09:00 AM: Hearing Vacated
- 12/20/2006 Request for Discovery
- 12/20/2006 Hearing result for No Contact Order held on 12/20/2006 09:00 AM: Continued

EXHIBIT A

12/20/2006 Order continuing preliminary
12/21/2006 Motion for temporary release and order
12/22/2006 Request for Discovery
12/22/2006 Response to Request for Discovery
12/22/2006 Motion for Temp release - DENIED
12/28/2006 Hearing Scheduled (Preliminary - continued 01/24/2007 09:00 AM)
01/08/2007 Request for Discovery
01/12/2007 Subpoena Returned served on Rebekah McGill
01/18/2007 Evaluation
01/18/2007 Motion to suppress
01/19/2007 State's Supplemental Response to Discovery
01/19/2007 Supplemental Response to Discovery
01/24/2007 Hearing result for Preliminary - continued held on 01/24/2007 09:00 AM:
Preliminary Hearing Waived (bound Over)
01/25/2007 Hearing Scheduled (Arraignment 02/05/2007 01:30 PM)
01/29/2007 Continued (Arraignment 02/20/2007 01:30 PM)
01/29/2007 Motion to Dismiss
01/29/2007 First Specific Request for Discovery
02/02/2007 State's Objection to Defendant's Motion to Dismiss
02/02/2007 Motion for Disqualification of Judge without cause
02/02/2007 Prosecuting Attorney's Information
02/08/2007 Supplemental Response to Discovery
02/09/2007 Order to Prepare Preliminary Hearing Transcript
02/20/2007 Hearing result for Arraignment held on 02/20/2007 01:30 PM: Hearing Held
02/21/2007 NCO expired
03/12/2007 Motion to Suppress
03/12/2007 Notice of Hearing
03/12/2007 Hearing Scheduled (Motions 03/19/2007 01:30 PM) Motion to Suppress
03/13/2007 Order Setting Pre-Trial Conference and Trial
03/14/2007 Motion to Dismiss
03/14/2007 Affidavit in Support of Motion to Suppress
03/14/2007 Notice of Hearing
03/14/2007 Brief in Support of Motion to Suppress
03/15/2007 State's Memorandum in Support of Objection to Defendant's Motion to Suppress
03/15/2007 State's Objection to Defendant's Motion to Suppress
03/15/2007 Affidavit of Penny North Shaul
03/19/2007 Minute Entry Hearing type: Motion to Suppress Hearing date: 3/19/2007 Time:
1:30 pm Court reporter: Jack Fuller Audio tape number: 2862
03/19/2007 Continued (Motions 04/16/2007 01:30 PM) Motion to Suppress
03/22/2007 Subpoena Returned - recalled
03/22/2007 Subpoena Returned - recalled
03/22/2007 Subpoena Returned - recalled
03/22/2007 Subpoena Returned - recalled
03/23/2007 Amended Prosecuting Attorney's Information
03/23/2007 Motion to Amend
04/16/2007 Hearing result for Motions held on 04/16/2007 01:30 PM: Hearing Held Motion to
Suppress
04/16/2007 Hearing Scheduled (Sentencing 05/21/2007 02:30 PM)
04/16/2007 Continued (Sentencing 05/21/2007 02:45 PM)
05/09/2007 Change Assigned Judge
05/22/2007 Hearing result for Sentencing held on 05/21/2007 02:45 PM: Hearing Vacated
05/22/2007 Motion to Withdraw Plea

05/31/2007 Hearing Scheduled (Motn to set aside plea 06/12/2007 01:30 PM)
06/15/2007 Hearing result for Motn to set aside plea held on 06/12/2007 01:30 PM: Hearing Held
06/18/2007 Guilty Plea Or Admission Of Guilt (I18-6101 Rape)
06/18/2007 Sentenced To Pay Fine
06/18/2007 Case Status changed: closed pending clerk action
06/27/2007 Motion to Reduce Sentence
06/28/2007 Objection to Motion to Reduce Sentence
06/28/2007 Probation Ordered (I18-6101 Rape) Probation term: 15 years. (Supervised)
06/28/2007 Sentenced To Incarceration (I18-6101 Rape) Confinement terms: Discretionary: 90 days. Penitentiary determinate: 2 years. Penitentiary indeterminate: 10 years.
08/31/2007 Hearing Scheduled (Arraignment 09/07/2007 09:15 AM)
08/31/2007 Case Status changed: Reopened
09/07/2007 Change Assigned Judge
09/20/2007 Hearing result for Motion to Reduce Sentence held on 09/14/2007 10:00 AM: Hearing Held
09/20/2007 Hearing Scheduled (Status Conference 10/12/2007 11:00 AM) telephonic - Ms. Shaul to initiate phone call
09/20/2007 Minute Entry and Order
12/03/2007 Warrant Issued - Bench
12/03/2007 Case Status changed: Inactive
12/03/2007 Probation Violation
12/03/2007 Warrant Issued - Bench Bond amount: 50000.00 Probation Violation--Fail To comply Defendant: Saxton, David
12/03/2007 Clerk Affidavit
12/04/2007 Warrant Returned Probation Violation--Fail To comply Defendant: Saxton, David
12/04/2007 Case Status changed: Activate (previously inactive)
12/05/2007 Hearing result for Status Conference held on 10/12/2007 11:00 AM: Hearing Vacated telephonic - Ms. Shaul to initiate phone call
12/10/2007 Hearing Scheduled (Probation Violation Hearing 12/19/2007 01:30 PM)
12/19/2007 Hearing result for Probation Violation Hearing held on 12/19/2007 01:30 PM: Hearing Held
12/19/2007 Hearing Scheduled (Probation Violation Hearing 01/04/2008 11:00 AM) Evidentiary
12/19/2007 Continued (Probation Violation Hearing 01/04/2008 10:00 AM) Evidentiary
12/21/2007 Notice of time for Evidentiary Hearing
12/21/2007 Minute Entry on Probation Violation hearing
12/24/2007 Transcript Filed
01/03/2008 Stipulation to continue hearing set for January 4, 2008
01/04/2008 Substitution Of Counsel
01/04/2008 Continued (Probation Violation Hearing 02/08/2008 09:00 AM) Evidentiary
01/04/2008 Order continuing hearing
01/28/2008 Stipulation for pshychological evaluation pursuant to idaho code 18-210 and 18-211
Hearing result for Probation Violation Hearing held on 02/08/2008 09:00 AM:
01/29/2008 Hearing Vacated Evidentiary (a stipulation will be filed for a motion for 18-211 evaluation)
01/29/2008 order for pshychological evaluation pursuant to idaho code 18-210 and 18-211
03/05/2008 Amended Hearing Transcript on Probation Violation Hearing held December 19, 2007.
03/10/2008 Evaluation (to show competence) from Dr. Lindsey
03/12/2008 Defendant's Specific Request for Discovery Request for Discovery and Inspection
03/13/2008 Hearing Scheduled (Probation Violation Hearing 04/18/2008 09:00 AM)
03/24/2008 Request for Discovery

03/24/2008 Response to Request for Discovery
04/10/2008 Personal Return of Service (Andra Harding)
04/10/2008 Personal Return of Service (Teresa England)
Hearing result for Probation Violation Hearing held on 04/18/2008 09:00 AM:
04/25/2008 District Court Hearing Continued Court Reporter: Jack Fuller Number of
Transcript Pages for this hearing estimated:
04/25/2008 Supplemental Response to Request for Discovery
09/22/2008 letter to Shawn Glenn, Custer County Prosecutor, from Judge Tingey
10/27/2008 Hearing Scheduled (Status Conference 11/07/2008 01:30 PM)
10/27/2008 Prosecutor Assigned Robin D. Dunn
11/07/2008 Hearing result for Status Conference held on 11/07/2008 01:30 PM: Motion Held
12/12/2008 second amended order of probation
01/09/2009 Hearing Scheduled (Status Conference 01/22/2009 11:00 AM)
01/23/2009 Continued (Status Conference 01/29/2009 10:30 AM)
01/28/2009 Continued (Status Conference 01/29/2009 03:00 PM)
01/29/2009 Guilty Plea Or Admission Of Guilt (IPV Probation Violation-misdemeanor)
01/29/2009 Case Status changed: closed pending clerk action
01/30/2009 Judgment and Commitment on a Conviction of a Probation Violation
01/30/2009 Sentenced To Incarceration (IPV Probation Violation-misdemeanor) Confinement
terms: Penitentiary determinate: 2 years. Penitentiary indeterminate: 10 years.
01/30/2009 Hearing result for Status Conference held on 01/29/2009 03:00 PM: Motion Held
01/30/2009 Minute Entry on probation violation
03/19/2009 Motion to reduce sentence and notice of hearing
03/23/2009 Hearing Scheduled (Motion to Reduce Sentence 04/17/2009 09:00 AM)
03/23/2009 Notice of Hearing
03/25/2009 Continued (Motion to Reduce Sentence 04/30/2009 10:00 AM)
05/01/2009 Hearing result for Motion to Reduce Sentence held on 04/30/2009 10:00 AM:
Motion Held
05/01/2009 Rule 35 Motion and Order (DENIED)
11/20/2009 Order appointing public defender
01/26/2012 Case Status changed: closed

Connection: Public